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No.

IN THE

Supreme Court of the United States

GUANG CHYI LIU; SUSAN YEH LIU;
GCSCL CO INC., PETITIONERS

v.

DUNKIN' DONUTS INC; THIRD DUNKIN'
DONUTS REALTY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since this Court's decision *Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)* was decided, federal courts are required to apply state law when the substantive issues before the courts are related to real estate or other essentially local, immobile matters.

The questions presented are (1) whether the failure of the federal courts to apply state law to the lease portion of a franchise agreement, which consists of a separate lease for the premises the franchisee operates and a separate franchise operation agreement between the franchisor and the franchisee, resulted in a violation of petitioners' constitutional rights; and (2) whether circuit courts shall certify unclear state law issues to the state highest court for interpretation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 17

APPENDIX

CIRCUIT COURT OPINION (11/06/03) 1a

DISTRICT COURT ORDER (10/16/02) 10a

DISTRICT COURT ORDER (06/25/02) 25a

CIRCUIT COURT ORDER (12/04/03) 51a

TABLE OF AUTHORITIES

Page

CASES

BISTRIAN V. EAST HAMPTON SAND & GRAVEL CO., INC. (IN RE EAST HAMPTON SAND & GRAVEL CO., INC.) 25 B.R. 193, 199 (BANKR. E.D.N.Y. 1982) 10

ERIE R.R. CO. V. TOMPKINS, 304 U.S. 64 (1938) 7

EWING V. OLIVER REALTY, 305 PA. SUPER. 486, 451 A.2D 751, 756 (1982) 9

GUARANTY TRUST CO. OF NEW YORK V. YORK, 326 U.S. 99, 65 S. CT. 1464, 1471 (1945) 11

IN RE COLE BROS., 137 B.R. AT 651 10

IN RE KARFAKIS, 162 B.R. 719 (BANKR. E.D PA. 1993) 10, 11

IN RE MCLINN, 739 F.2D 1395, 1404 (9TH CIR. 1984) 15, 16

IN RE MORNINGSTAR ENTERPRISES, INC., 128 B.R. 102, 106 (BANKR. E.D.PA. 1991) 8

IN RE RITCHEY, 84 B.R. 474, 476 (BANKR. N.D.OHIO 1988) 10

IN RE T & H DINER, INC., 108 B.R. 448, 454 (BANKR. D.N.J. 1989) 10

IN RE TELEPHONICS, 85 B.R. 312, 316 (BANKR. E.D.PA. 1988) 8, 13

LENAIR V. CAMPBELL, 31 D.& C. 3D 237, 241 (1984) 9

PEITZMAN V. SEIDMAN, 285 PA. SUPER. 228, 427 A.2D 196 (1981) 9

PLEASURE HARBOR MARINA, INC. V. BOYLE, 282 PA. SUPER. 8, 15, 422 A.2D 649 (1980) 8, 9

ROBERTSON V. ALLIED SIGNAL, INC., 914 F.2D 360, 378 (3D CIR. 1990) 11

SWIFT V. TYSON, 16 PET. 41. U.S. 1, 1842 12

STATUTES

28 U.S.C. §1254(1) 1

PENNSYLVANIA LANDLORD TENANT ACT OF 1951 ..... *passim*

U.S. CONST. AMEND. X 1, 2

OTHER AUTHORITIES

Wendy E. Russell, Recent Development; State Law in Federal Courts, 60 Wash. L. Rev. 739 (1985) 15, 16

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for writ of certiorari to review the opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania's opinion (per Kelly, Judge) granting respondents' summary judgment motion (Appendix ("Pet. App.") 25a-50a) is unreported. The District Court's opinion (per Kelly, Judge) granting respondents' motion for attorneys' fees (Pet. App. 10a-24a) is unreported. The opinion of the United States Court of Appeals for the Third Circuit (per Sloviter, joined by Roth and Chertoff, Circuit Judges) affirming the judgment of the District Court (Pet. App. 1a-9a) is unreported. The Order of the Third Circuit denying rehearing and rehearing en banc (Pet. App. 51a-52a) is not otherwise published.

JURISDICTION

The Third Circuit entered its judgment on November 6, 2003. A timely petition for panel rehearing was denied on December 4, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS

The Tenth Amendment of the United States Constitution provides, in pertinent part: The powers not delegated to the United States by the Constitution,

nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pennsylvania Landlord Tenant Act of 1951.

STATEMENT

On March 31, 1995, the petitioners entered into a Franchise Agreement and a Lease for the premises for operating a Dunkin' Donuts Shop in Philadelphia, Pennsylvania. The franchisor Dunkin' Donuts is also the landlord for the premises.

The Franchise Agreement required that the petitioners pay weekly franchise and advertising fees based on the store's gross sales and the Lease required that the petitioners pay Dunkin' Donuts a monthly rent based on a rent-to-gross-sales ratio and monthly real estate and other taxes.

Dunkin' Donuts, using its "Quick Retail Sales Analysis" system, determined that the petitioners under-reported their gross sales in 1998 in violation of their Franchise Agreement. Dunkin' Donuts told the petitioners that it was terminating the Franchise Agreement on May 20, 1999, but the petitioners denied under-reporting their sales and refused to give up the store. On June 30, 1999, Dunkin' Donuts filed a complaint in federal district court to terminate the Franchise Agreement.

The petitioners denied all the allegations made by the Dunkin' Donuts against them and asserted counterclaims against Dunkin' Donuts for fraud, breach of implied covenant of good faith and fair dealing, and

breach of duty to cooperate. The petitioners alleged that Dunkin' Donuts used different tactics attempting to create a pretext to unlawfully terminate the Franchise Agreement "for cause".

In a letter dated December 10, 1999, Dunkin' Donuts offered the petitioners a settlement, pursuant to which the petitioners would "sell their shop, make restitution for their underreporting, and pay Dunkin's fees to date." The letter added that there was "no possibility of a settlement that would allow the petitioners to stay in the Dunkin' system." The offer was rejected by the petitioners.

Because of fighting the lawsuit against them by Dunkin' Donuts, the petitioners began falling behind on payments due to Dunkin' Donuts under the Franchise Agreement and failed to keep up their rent payments for a few months. After issuing a Notice to Cure and then a Notice of Termination, Dunkin' Donuts filed a second complaint in district court for unpaid fees and rents due, and moved for a preliminary injunction directing the petitioners to surrender the leased premises on July 20, 2000.

The petitioners again denied the allegations and asserted counterclaims against Dunkin' Donuts. The petitioners contended that the amount due was in dispute. The petitioners also alleged that the second action was moot, because the petitioners had already paid all undisputed arrears. The petitioners also alleged that the Dunkin' Donuts acted in bad faith engaging an ongoing pattern of systematic harassment of the petitioners in order to destroy their operations and their fight against the Dunkin' Donuts by

instituting a second action to deprive the petitioners of the only financial means they possessed to oppose Dunkin' Donuts' previous action.

On September 18, 2000, the district court held a preliminary injunction hearing, at which, petitioner, Susan Liu, testified that all amounts owed to Dunkin' Donuts had been paid as of the date of hearing, except most of the payments were not made in the time allowed to cure as provided in the Franchise Agreement and the Lease. Counsel for Dunkin' Donuts represented to the court that on September 1, 2000, his firm received several checks purporting to pay rents and a number of checks to pay the balance of the bills owed to Dunkin' Donuts. During the cross-examination, counsel for Dunkin' Donuts attacked Mrs. Liu's credibility concerning backdating the checks she sent to Dunkin' Donuts, but never disputed her testimony that the petitioners had paid everything up to date.

On November 20, 2000, Magistrate Judge, Thomas J. Rueter issued a Report and Recommendation, concluding that "defendants breached their obligation to pay plaintiffs in a timely fashion, and therefore plaintiffs validly terminated defendants' Franchise Agreement and Lease, pursuant to their express terms."

On December 21, 2000, district court Judge James McGirr Kelly approved and adopted Magistrate Judge Rueter's Report and Recommendation in his Memorandum and Order. The petitioners were ordered to cease their operation within 20 days from the date of

the Order. The petitioners complied, and the Dunkin' Donuts then sold the store to a third party for $665,000.

On April 17, 2002, Magistrate Judge Thomas J. Rueter recommended that Dunkin' Donuts' motion for a permanent injunction with respect to the termination of the Franchise Agreement and Lease be granted. Judge Rueter's recommendation focused on the finding that "even if there were a dispute as to the reasons for the untimely payments, there is no dispute that the payments were indeed untimely." "Plaintiffs properly terminated defendants sublease and franchise agreement, due to untimely payments, and defendants have offered no credible evidence to refute these findings. Therefore, this court recommends that plaintiffs' motion for summary judgment regarding nonpayment be granted." On June 25, 2002, district court Judge J.M. Kelly approved and adopted this Magistrate Judge's recommendation granting Dunkin' Donuts' motion for a permanent injunction terminating the Franchise Agreement and Lease.

The district court overlooked the fact that the petitioners had met the requirements and were permitted to keep their store under the Pennsylvania Landlord Tenant Act of 1951. The Third Circuit reviewed the unclear state law issue whether the Pennsylvania Landlord Tenant Act of 1951 is applicable in the instant case and concluded that it was inapplicable. No certification of the state law issue to the state highest court occurred.

THE THIRD CIRCUIT DECESION

On November 6, 2003, the Court of Appeals for the Third Circuit affirmed the district court's judgment. On December 4, 2003, the Third Circuit denied the petition for panel rehearing and/or en banc rehearing.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for the following reasons. First, the effects of the decision of the Third Circuit are grave. Its refusal to follow controlling state law was an unconstitutional assumption of powers by the courts of the United States and clearly invaded state sovereignty, which was contrary to the principle of the Tenth Amendment. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state, whether they are local in their nature or general. No clause in the Constitution purports to confer such a power upon the federal courts.

Second, in the areas of unclear state law, the Third Circuit improperly disregarded the settled jurisprudence to questions that turn on state law and improperly arrived at its own interpretation. In order to avoid the development of a body of separate, federally created divergent state laws, the Third Circuit should have certified the unclear state law issue to the state highest court of the State of Pennsylvania. Failure to certify the unclear state law issue to the state highest court may result a divergent outcome

should the issue were decided by the state highest court.

In the instant case, the Third Circuit disregarded the principle set forth by this Court in *Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)*, that a federal court shall apply state law when the matter before the court is related to real estate or other essentially local and immobile matters. The decision permitted Dunkin' Donuts to circumvent the protections given to the petitioners by state law, specifically Pennsylvania Landlord Tenant Act, by terminating the lease through the termination of the franchise agreement between the parties even though the petitioners cured the default of non-payment of rent.

I. The Third Circuit Failed to Apply the Law of Pennsylvania to This Case, Contrary to the Teaching of *Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).*

This case involved the construction of a conjoined franchise agreement and lease of real property entered into in the State of Pennsylvania. The issue before the court was the treatment of petitioners who were initially in arrears in their payments under the agreement, but later cured the arrearage.

The Pennsylvania Landlord Tenant Act of 1951 shall apply to this case. Section 250.503 of the Article V of the Pennsylvania Landlord Tenant Act of 1951 provides that

> "[a]t any time before any writ of possession is actually executed, the tenant may, in any case for the recovery of possession solely because of failure to pay rent due, supersede and render the writ of no effect by paying to the writ server, constable or sheriff the rent actually in arrears and the costs."

Pennsylvania Landlord Tenant Act of 1951, art. V, sec. 250.503. In another words, as long as the tenants paid rent due and owing before they were evicted, they cannot be evicted. *See In Re Telephonics*, 85 B.R. 312, 316 (Bankr. E.D.Pa. 1988) (holding that a tenant retained a right to cure any rental deficiency and preserve the tenancy until the moment of actual valid and complete eviction); *In Re Morningstar Enterprises, Inc.*, 128 B.R. 102, 106 (Bankr. E.D.Pa. 1991); *In Re C & C TV & Appliance, Inc.*, 97 B.R. 782 (Bankr. E.D.Pa. 1989), *aff'd*, 103 B.R. 590 (E.D.Pa. 1989).

In *Pleasure Harbor Marina, Inc. v. Boyle*, 282 Pa. Super. 8, 15, 422 A.2d 649 (1980), the tenant's leasehold rental was beyond the 30-day grace period allowed by the lease and taxes had not been paid by the deadline as required by the lease. The landlord contended that he was entitled to an eviction order. The court rejected his argument. A termination of the lease by reason of such a default required affirmative action on the part of the landlord while the default was in effect.

> "When a tenant defaults in the payment of rent under a lease, giving the landlord a right to declare a forfeiture for this

> reason, if, before a forfeiture is declared by the landlord, the rent due is paid, the right to take advantage of the default as a forfeiture has passed."

Id., 282 Pa. Super. at 15.

The Act is the exclusive remedy. While the State of Pennsylvania has no franchise relationship laws applicable to franchising in general, the controlling State statue in the instant case for terminating a lease is the Pennsylvania Landlord Tenant Act of 1951. "In the text of the Landlord and Tenant Act of 1951 the legislature clearly expressed its intention that the Act be the sole source of rights, remedies and procedures governing the landlord/tenant relationship. Section 602 of the act provides: 'All other acts and parts of acts, general, local and special, inconsistent with or supplied by this act, are hereby repealed. It is intended that this act shall furnish a complete and exclusive system in itself. 1951, April 6, P.L. 69, Art. VI. Section 602, 68 P.S. §250.602.'" *Lenair v. Campbell*, 31 D.& C. 3d 237, 241 (1984).

Appellate decisions in Commonwealth of Pennsylvania support the conclusion that the legislature envisioned the Act as a complete and exclusive remedy for a landlord seeking to vindicate his rights. *See, Ewing v. Oliver Realty*, 305 Pa. Super. 486, 451 A.2d 751, 756 (1982); *Peitzman v. Seidman*, 285 Pa. Super. 228, 427 A.2d 196 (1981).

In a case like this, the franchise and the lease agreement must be read as one agreement, and the 1951 Act controls the result. Indeed, an agreement like

this one was considered in *In Re Karfakis*, 162 B.R. 719 (Bankr. E.D Pa. 1993), which involved an earlier dispute between Dunkin' Donuts and another Pennsylvania franchisee. The *Karfakis* Court applied the 1951 Act and held that if either agreement was viable, the entire agreement remained extant. *Id.* Both agreements here were coterminous and contained cross default provisions. The petitioners assumed both documents on the same date for a single purpose of operating a franchised Dunkin' Donuts shop. Dunkin Donuts' representatives signed the agreement on behalf of both entities, Dunkin' Donuts and Third Dunkin' Donuts Realty. Therefore, the parties' intention that the Lease and the Franchise Agreement constitutes a single agreement is clearly manifested.

The arrangement of the Lease and the Franchise Agreement in *Karfakis* and the Lease and Franchise Agreement here is virtually identical. Dunkin' Donuts there was also the landlord of the lease. The issue before that court was whether "there has been an effective pre-petition termination of the Debtors' contractual relationship with Dunkin' Donuts." *Id* at 724. The court there was persuaded that the two contracts are essentially inseparable. *See, In Re Cole Bros.*, 137 B.R. at 651; *In Re T & H Diner, Inc.*, 108 B.R. 448, 454 (Bankr. D.N.J. 1989); *In Re Ritchey*, 84 B.R. 474, 476 (Bankr. N.D.Ohio 1988); *Bistrian v. East Hampton Sand & Gravel Co., Inc. (In Re East Hampton Sand & Gravel Co., Inc.)* 25 B.R. 193, 199 (Bankr. E.D.N.Y. 1982). "Aside from being coterminous and containing cross default provisions; it is readily apparent that one agreement is of no utility without the other. The Franchise Agreement permits the Debtor to operate a specific Franchise Store at a

specific location which is simultaneously leased to the Debtor/Franchisee by a Dunkin' Donuts affiliate as Lessor." *Karfakis*, 162 B.R. 719, 725.

The Third Circuit erred in failing to apply the Pennsylvania Landlord Tenant Act 0f 1951 to the entire Franchise and Lease Agreement in the instant case. Federal courts that decide state law claims are required to apply the substantive law of the state whose laws govern the action. *See, Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 378 (3d Cir. 1990) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464, 1471 (1945), this Court made it clear that "[w]henever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity." The policy behind this rule is that for the same transaction, the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result. *See, Id* 65 S.Ct. at 1470.

Even if the Third Circuit properly treated the Franchise Agreement and the Lease separately, it still erred in failing to apply the Pennsylvania Landlord Tenant Act to the Lease portion of the Franchise Agreement. The undisputed fact is that there is a lease. As long as there is a lease, the Pennsylvania Landlord Tenant Act is applicable to that lease. When the state laws afford more protections to its residents, the federal courts cannot deprive them of the

protection provided by the state constitution. The policy offended by the Third Circuit is the distribution of judicial powers between state and federal courts and the preservation of state autonomy and independence, including independence in their legislative and judicial departments. A case of this significance deserves review by this Court.

II. The Third Circuit's Refusal to Apply State Law Offends Public Policy Because It Allows a Powerful Party to Circumvent the Protection Afforded a Citizen By State Law.

Failure to apply state law in real estate matters encourages plaintiffs try to maneuver into a federal court in order to evade a state body of law that is unfavorable. In the instant case, the franchisor Dunkin' Donuts repeats the undesirable grave discrimination by non-citizens against citizens in *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), which gave the non-citizen the ability to "forum-shop" for the forum most favorable to him.

The Third Circuit failed to recognize the inherent disparity of bargaining power, which exists between Dunkin' Donuts and the petitioners, and the resulting misfortunes of the petitioners. Dunkin' Donuts, a Delaware corporation with its principal place of business in Massachusetts, operates approximately 3,700 franchised shops in the United States and 4,700 globally. Petitioners run a "mom and pop" operation of a Dunkin' Donuts franchised store in Pennsylvania.

In the instant case, there is a sound public policy reason requiring the federal courts to apply the Pennsylvania Landlord Tenant Act of 1951 to the lease

portion in the conjoined franchise agreement in the State of Pennsylvania. To do so can prevent powerful franchisor from circumventing the protection afforded by the Act to the franchisee by terminating the lease through the termination of the franchise agreement between the parties even if the franchisee has cured the default of non-payment of rent. In Pennsylvania, there is a strong public policy preventing eviction of families from their residences, and that same policy applies as to Pennsylvania commercial leases. *See In Re Telephonics*, 85 B.R. 312, 316 (Bankr. E.D.Pa. 1988).

Otherwise, injustice will result. The franchisee's property rights under the lease will be instantaneously terminated without the protection of the Pennsylvania Landlord Tenant Act of 1951. In the instant case, the franchisor, Dunkin' Donuts, ends up with a windfall, acquiring the unexpired lease interest of the franchisee through termination of the Franchise Agreement without paying any consideration. The petitioners' Dunkin' Store was later sold for $665,000.00. A substantial portion of the purchase price is the leasehold interest. The equity is clearly not balanced. Even if the franchisee defaults under the franchise agreement, the punishment shall be in proportion but not a total loss of his property interest. The franchisor shall still compensate the leasehold interest of the franchisee, if the two agreements were treated as a single agreement. Dunkin' Donuts unjust enrichment of $665,000 was the direct result of Dunkin' Donuts powerful bargaining power to exploit the petitioners and to evade the protection of the 1951 Act.

The interpretation that the lease is the primary agreement and the franchise agreement is

supplemental is also consistent with the situation where the franchisor is not the landlord of the premises of franchise business. In that situation, even if the franchise agreement is terminated for any reason, the franchisee will not lose everything instantaneously. Franchisee's property right under the lease remains unchanged. The owner of the store can still operate without using the trademark of the franchisor to earn a living or to transfer his leasehold interest to a third party, who are permitted to operate a Dunkin's donuts shop.

In the instant case, the franchisee, Susan Liu, testified in open court that the petitioners had paid all arrears before the September 18, 2000 Injunctive Relief hearing. The Dunkin' Donuts did not dispute the fact that the arrears were all paid. Therefore, Dunkin' Donuts' right to take advantage of the default as a forfeiture has passed. The findings that the Lius' testimonies were not credible because they had backdated the checks are legally not relevant. The real focus should have been whether or not the petitioners had caught up all the payments before the September 18, 2000 hearing. If the petitioners had done so, the Court should have no choice but to dismiss Dunkin's non-payment of rent claims under the law of the Pennsylvania Landlord Tenant Act of 1951.

III. In the Areas of Unclear State Law Issue, the Federal Court shall Certify the Issue to the State Highest Court for Ruling to Avoid the Development of a Body of Separate, Federally Created Divergent State Laws.

This Court shall also review the instant case to evaluate the applicability of the *Erie* doctrine and to provide useful guidelines for the lower courts to follow, when dealing with unclear state law issues. The *Erie* doctrine held that federal courts are to apply state law as declared by the legislature or the state's highest court. If there is no authoritative state ruling on an issue, the federal court is to predict how the state's highest court would decide the issue. *See*, Wendy E. Russell, *Recent Development: State Law in Federal Courts*, 60 Wash. L. Rev. 739, 740 (1985).

In applying *Erie* doctrine to unclear state law issues, federal courts face a practical problem. In order to analyze unresolved state law issues, the federal courts are called to create state laws that they can apply. This process goes far beyond merely applying state law. There is no way to insure that the federal courts would resolve the complexities of novel issues in the same manner as the state's highest court. *Id* at 745.

To reduce the uncertainty of interpreting the state laws, different circuit courts have different approaches. Some federal appellate courts customarily limit their review of state law by deferring to district court judges. *See, In Re McLinn*, 739 F.2d 1395, 1404 (9th Cir. 1984). District court judges are considered better able to ascertain state law and thus better able to achieve the *Erie* goal of conformity to state court

decisions. The significant costs to the approach of deference to the district court decision on state law is that appellate review of district court's state law decision is denied simply because a case arises in the federal forum. *See* Russell, 60 Wash. L. Rev. 739, 745 (1985). Other circuit courts, however, adopt a de novo or a plenary review standard like Third Circuit in the instant case. *See McLinn*, 739 F.2d at 1398 (1984). This approach increases the risk of federal courts creating doctrine that diverges from a state's interpretation of its own law.

Legal Scholars suggested a way to insure the accurate determination of unclear state law issues by federal courts. Certification of state law issues to state highest court provides the most direct and feasible means of avoiding federal decision of state law issues. The certification process allows federal courts to submit unclear state law issues to state highest court for decision. Therefore, the risk to develop a body of separate, federally created divergent state laws is avoided. *See* Russell, 60 Wash. L. Rev. at 755.

In the instant case, should the unclear state law issue whether Pennsylvania Landlord Tenant Act of 1951 was applicable to the lease portion of a franchise agreement, which consists of a separate lease for the premises the franchisee operates and a separate franchise operation agreement between the franchisor and the franchisee be certified to the state highest state court in the State of Pennsylvania, the outcome of the case may be totally different as the petitioners demonstrate above. Clearly, an urgency to provide a uniform standard among circuit courts regarding

dealing with unclear state law issues is needed. This case accordingly merits the Court's immediate review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari shall be granted. The decision of the Third Circuit shall be reversed and the case shall be remanded to that court with directions to consider applicable Pennsylvania law.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 02-2972

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DUNKIN' DONUTS INCORPORATED; THIRD DUNKIN' DONUTS REALTY, INC.

v.

GUANG CHYI LIU; SUSAN YEH LIU; G.C.S.C.L. COMPANY, INC. (Eastern District of Pa. Civil No. 99-cv-03344);

DUNKIN' DONUTS INCORPORATED; THIRD DUNKIN' DONUTS REALTY, INC.

v.

GUANG CHYI LIU; SUSAN YEH LIU; G.C.S.C.L. COMPANY, INC. (Eastern District of Pa. Civil No. 00-cv-03666); GUANG CHYI LIU; SUSAN YEH LIU; G.C.S.C.L. COMPANY, INC.,
Appellants

October 14, 2003,
Submitted Under Third Circuit LAR 34.1(a)
November 6, 2003, Filed

COUNSEL: For Dunkin Donuts Inc, Third Dunkin Donuts Realty, Inc., Appellees: Robert L. Zisk, David E. Worthen, Steven A. Browne, Schmeltzer, Aptaker & Shepard, Washington, DC.

For Guang Chyi Liu, Susan Yeh Liu, Gcscl Co Inc, Appellants: Kevin K. Tung, Flushing, NY.

JUDGES: Before: SLOVITER, ROTH, and CHERTOFF, Circuit Judges.

OPINIONBY: Dolores K. Sloviter

OPINION: OPINION OF THE COURT

SLOVITER, Circuit Judge.

Appellants Guang Chyi and Susan Yeh Liu and G.C.S.C.L. Co., Inc. (the corporation that had the obligations under the relevant agreements) (collectively the Lius) appeal from the June 25, 2002 Order of the District Court (1) denying their motion for reconsideration of their counterclaim for breach of the implied covenant of good faith and fair dealing, (2) granting the motion of the appellees Dunkin' Donuts and Third Dunkin' Realty (Dunkin' collectively) for summary judgment on their claims for unpaid rent and fees, (3) granting Dunkin's motion to strike Mr. Liu's May 2, 2002 filing and (4) granting Dunkin's motion for a permanent injunction terminating the Franchise Agreement and Lease between the parties. The Lius also appeal the District Court's October 17, 2002 Order awarding Dunkin' $ 199,974.62 in attorney's fees and $ 28,468.47 in expenses.

Because we write solely for the parties and not for publication, we need not set forth a detailed recitation of the background for these appeals and will limit our discussion to resolution of the issues presented.

I.

On March 31, 1995, the Lius became franchisees of Dunkin' Donuts pursuant to an "agreement to transfer"; this agreement included the assumption of a Franchise Agreement and a Lease Agreement. The Franchise Agreement required that the Lius pay weekly franchise and advertising fees based on the store's gross sales and interest on unpaid fees. Pursuant to the Lease Agreement, the Lius paid Dunkin' a monthly rent totaling up to $ 7,812.50; "annual percentage rent" based on a rent-to-gross-sales ratio; and monthly real estate and other taxes.

Dunkin', using its "Quick Retail Sales Analysis" system, determined that the Lius under-reported their gross sales in 1998 in violation of their Franchise Agreement. Dunkin' told the Lius it was terminating the Franchise Agreement on May 20, 1999, but the Lius denied under-reporting their sales and refused to give up the store.

On June 30, 1999, Dunkin' filed a complaint in the District Court to terminate the Franchise Agreement. The Lius asserted counterclaims against Dunkin' for fraud, breach of implied covenant of good faith and fair dealing, and breach of duty to cooperate.

In a letter dated December 10, 1999, Dunkin' offered the Lius a settlement, pursuant to which the Lius would "sell their shop, make restitution for their underreporting, and pay Dunkin's fees to date." The letter added that there was "no possibility of a settlement that would allow [the Lius] to stay in the Dunkin' system." The Lius refused this offer. When the Lius began falling behind on the franchise

and advertising fees due under the Franchise Agreement, and failed to keep up there rents payments, Dunkin' first issued a Notice to Cure and then issued a Notice of Termination. Dunkin' filed a second complaint in District Court for unpaid fees and rents due and moved for a preliminary injunction on July 20, 2000.

At a preliminary injunction hearing on September 18, 2000, Mrs. Liu testified that all amounts owed to Dunkin' had been paid. The Magistrate Judge found her testimony not to be credible because she made misrepresentations regarding backdated checks. Because the Lius had breached their obligation to pay Dunkin' in a timely manner, the Magistrate Judge recommended that Dunkin's termination of the Lease be upheld.

The Court consolidated the two cases on September 27, 2000. On December 21, 2000, the District Court granted Dunkin's motion for preliminary injunction and directed the Lius to cease operations and deliver possession of the premises to Dunkin'. The Lius complied, and Dunkin' then sold the store to a third party for $ 665,000. On February 14, 2002, the District Court also granted Dunkin's motion for summary judgment as to the Lius' counterclaims.

On May 2, 2002, Mr. Liu filed a handwritten document, not signed by his attorney, which stated that he would like to "preserve the right to argue . . . [landlord and tenant] 'issues' in later stages." On June 25, 2002, the District Court struck from the record Mr. Liu's handwritten May 2, 2002 filing because the document was not signed by counsel, in violation of Federal Rule

of Civil Procedure 11. The District Court also granted Dunkin' summary judgment for non-payment of fees, and a permanent injunction terminating the Franchise Agreement and Lease. On October 17, 2002, pursuant to the fee-shifting provision in the Franchise Agreement, the District Court awarded Dunkin' $ 97, 499.70 in attorney's fees and $ 13,872.96 in expenses based on the nonpayment issue, and $ 102,474.92 in attorney's fees and $ 14,595.51 in expenses relating to Dunkin's defense against the Lius' counterclaims, which the District Court found had no merit. The Lius filed a timely Notice of Appeal.

II.

We review the District Court's grant of summary judgment de novo. Huang v. BP Amoco Corp., 271 F.3d 560, 564 (3d Cir. 2001). We review the Lius' claim regarding the Pennsylvania Landlord Tenant Act of 1951 under a plenary standard. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701 (3d Cir. 1993).

III.

The Lius argue that the District Court failed to apply the Pennsylvania Landlord Tenant Act of 1951 when it reviewed Dunkin's motions for summary judgment and permanent injunction terminating the Lease. As a threshold matter, the Lius argue that they preserved this issue for appeal based on Mr. Liu's May 2, 2002 handwritten submission raising unspecified landlord-tenant issues, which was filed approximately fifteen months after the Lius vacated the store. Federal Rule of Civil Procedure 11(a) requires that pleadings include the signature of the party's attorney, and the signer's

address and telephone number. Because Mr. Liu's filing included neither his attorney's signature nor his address or telephone number, the filing did not comply with Rule 11. Moreover, Mr. Liu's letter did not request specific relief or provide supporting legal arguments or facts necessary to state a cognizable claim. The District Court did not err in striking Mr. Liu's filing.

The Pennsylvania Landlord Tenant Act on which the Lius rely is not applicable to this case. The Act provides that, "before any writ of possession is actually executed, the tenant may, in any case for the recovery of possession solely because of failure to pay rent due, supersede and render the writ of no effect by paying . . . the rent actually in arrears and the costs." 68 Pa. Cons. Stat. § 250.503(c). The Lius did not default "solely because of failure to pay rent due," but also because of failure to pay franchise and advertising fees due.

Despite the plain language of the statute, the Lius contend that Section 250.503(c) applies because the Lease and Franchise Agreements constitute one, coterminous contract contemplating franchise and adverting fees as additional "rents." The cases on which the Lius rely only suggest that a lease and a franchise agreement may be read as a single indivisible agreement under bankruptcy statutes governing the assumption of executory statutes. See, e.g., In re Karfakis, 162 B.R. 719 (Bankr. E.D. Pa. 1993). Although the Franchise and Lease Agreements were signed the same day by largely the same parties and have cross-default provisions, such interconnection does not convert franchise and advertising fees into "rent." Indeed, the Lius provide no authority for the proposition that franchise and advertising fees

constitute "rent" within the meaning of Section 250.503(c). As Section 250.503(c) does not apply to the Lius' circumstances, it does not provide any basis to overturn the dismissal of the landlord-tenant claim.

The Lius also argue that the District Court improperly dismissed their counterclaim against Dunkin' for breach of the covenant of good faith and fair dealing by terminating the Lease based on improper financial motives. The Lius allege that Dunkin' imposed costly remodeling requirements and used an unreliable accounting system that over-estimated gross sales and franchise fees as a pretext to "broker" the Lius' store; that is, acquire the store through a legal proceeding for no consideration and resell it to a third party for a $ 665,000 profit. By contrast, the District Court found that the Lius did not provide sufficient evidence to support their claim; moreover, as a matter of law, the Lius' material breach of the Franchise Agreement triggered Dunkin's right to terminate the Agreement, rendering any ulterior financial motive irrelevant.

We need not revisit the sufficiency of the Lius' evidence because the legal issue here is controlling. We have previously stated that a "franchisor has the power to terminate the relationship where the terms of the franchise agreement are violated." S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 375 (3d Cir. 1992). Here, the terms of the Agreement authorized termination of the Franchise based upon material breach, such as unpaid rent and fees. As such, even if the Lius had produced sufficient evidence of Dunkin's ulterior motive, motivational analysis would have been irrelevant because the Lius' non-payment constituted a material breach of the contract, which provided Dunkin'

legitimate grounds for termination. We thus affirm the District Court's ruling.

The Franchise Agreement contained a specific fee-shifting provision for the award of reasonable attorney's fees as defined under Massachusetts law. Under Massachusetts law, courts are entitled to broad discretion, but are directed to consider the ability of the attorneys and the demand for their services, time spent on the matter by the attorneys, prices charged for similar services in similar areas, the value of the property affected, and the results secured by the attorneys. See Mulhern v. Roach, 398 Mass. 18, 494 N.E.2d 1327 (Mass. 1986). Because the District Court did not abuse its discretion or provide an excessive award to Dunkin', we affirm the District Court's October 17, 2002 Order awarding fees and costs. n1

IV.

For the reasons set forth, we will affirm the judgment of the District Court.

/s/ Dolores K. Sloviter
Circuit Judge

FOOTNOTES

n1 In the Lius' reply brief, they argue that they are entitled to relief from the District 2 Court's October 17, 2002 Order awarding Dunkin' attorney's fees and costs based on 3 various equitable factors. Inasmuch as the Lius' opening brief only challenged the 4 attorney's fees award on "excessiveness" grounds and did not mention the equities 5 argument, they have waived that

argument. See Laborers Int'l Union 6 v. Foster WheelerCorp., 26 F.3d 375, 398 (3d Cir. 1994).

CIVIL ACTION No. 99-3344, 00-3666

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DUNKIN' DONUTS INC., et al.
Plaintiffs,

v.

GUANG CHYI LIU, et al.,
Defendants.

October 16, 2002, Decided
October 17, 2002, Filed

COUNSEL: For Dunkin' Donuts Incorporated, Third Dunkin' Donuts Realty, Inc, PLAINTIFFS (2:99cv3344): David E Worthen, Steven A Browne, Robert L Zisk, Thomas P Carroll, Richard L Creech, Schmeltzer, Aptaker and Shepard, PC, Washington, DC USA. Craig R Tractenberg, John J Jacko, III, Buchanan Ingersoll Professional Corporation, Philadelphia, PA USA.

For Guang Chyi Liu, Susan Yeh Liu, GCSCL Company, Inc, DEFENDANTS (2:99-cv3344): Sean M Halpin, Richard H Glanton, Reed, Smith, Shaw and MC Clay, Philadelphia, PA USA.

Guang Chyi Liu, DEFENDANT, Pro se, Sewell, NJ USA.

Susan Yeh Liu, DEFENDANT, Pro se, Sewell, NJ USA.

For Textron - Financial Corp, (2:99cv3344) RESPONDENT: Scott D Patterson, Saul, Ewing, Remick & Saul, Berwyn, PA USA.

For Dunkin' Donuts Incorporated, Third Dunkin' Donuts Realty, Inc, PLAINTIFFS (2:00cv3666): David E Worthen, Steven A Browne, Robert L Zisk, Schmeltzer, Aptaker and Shepard, PC, Washington, DC USA, John J Jacko, III, Buchanan, Ingersol, Philadelphia, PA USA.

For Guang Chyi Liu, Susan Yeh Liu, GCSCL Company, Inc DEFENDANTS (2:00cv3666): Richard H Glanton, Reed, Smith, Shaw and MC Clay, Philadelphia, PA USA.

JUDGES: JAMES McGIRR KELLY, J.

OPINIONBY: JAMES McGIRR KELLY

OPINION:

MEMORANDUM AND ORDER

J. M. KELLY, J.

October 16, 2002

Presently before the Court is a Rule 54(d) Fee Petition, or in the Alternative, Motion to Amend the Judgment to Include an Order of Reasonable Attorneys' Fees and Expenses filed by the Plaintiffs, Dunkin' Donuts Incorporated and Third Dunkin' Donuts Realty, Inc. (collectively, "Plaintiffs"). Plaintiffs filed their Petition following this Court's June 25, 2002 entry of summary

judgment in their favor on Counts I-IV of their Complaint relating to nonpayment pursuant to the terms of the parties' Franchise Agreement. n1 Defendants Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company (collectively, "Defendants") object to this Court's jurisdiction to rule on the Fee Petition subsequent to their filing a Notice of Appeal with the United States Court of Appeals for the Third Circuit, but do not dispute the enforceability of the terms of the Franchise Agreement.

1. BACKGROUND

The procedural history of this case is extensive and, thus, only that portion relevant to this Court's disposition of Plaintiffs' Fee Petition will be provided below.

Following this Court's entry of summary judgment on June 25, 2002 in favor of Plaintiffs, Plaintiffs timely filed the instant Fee Petition on July 9, 2002. Defendants filed their Notice of Appeal to the Third Circuit on July 16, 2002. On July 23, 2002, the Third Circuit ordered Defendants' appeal stayed pending this Court's disposition of Plaintiffs' timely filed post-judgment motion.

Both parties were provided opportunity to brief the issue of attorneys' fees. On August 1, 2002, Defendants filed their Memorandum in Opposition to Plaintiffs' Fee Petition and, on August 12, 2002, Defendants filed a Pre-Hearing Memorandum. A hearing was held on August 14, 2002, after which time this Court ordered Plaintiffs' counsel to submit an additional memorandum within seven days concerning the allocation of fees and

expenses as to certain issues, and Defendants' counsel to file a response thereto seven days thereafter. On August 22, 2002, Plaintiffs filed their Supplemental Memorandum and, on August 29, 2002, Defendants filed their Supplemental Memorandum.

Noting that they had already filed their Notice of Appeal with the Third Circuit, Defendants object to this Court's jurisdiction to rule on Plaintiffs' Petition as either a Rule 54(d) motion for attorneys' fees or a Rule 59(e) motion to amend the judgment. (Defs.' Mem. in Opp'n. to Pls.' Rule 54(d) Fee Pet., or in the Alternative, Mot. to Amend the J., at pp. 1-2.) Notwithstanding their objection to jurisdiction, Defendants also briefed this Court on the legal standard for awards of reasonable attorneys' fees under Massachusetts law. n2 (Defs.' Pre-Hearing Mem. Re: Att'ys.' Fees, at pp. 1-5.) In addition, Defendants argue that they are entitled to a jury trial on the reasonableness of requested attorneys' fees. (Defs.' Reply to Pls.' Supplemental Mem. Regarding Att'ys' Fees, at pp. 1-2.) Defendants, however, do not dispute the enforceability of the Franchise Agreement or the fee-shifting provision contained therein.

2. DISCUSSION

3. JURISDICTION

As a preliminary matter, Defendants object to this Court's jurisdiction to rule on Plaintiffs' Petition on the ground that Defendants already filed their Notice of Appeal with the Third Circuit. The filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction upon a court of

appeals and divesting a district court of its control over those aspects of the case involved in the appeal; however, it is well-settled that a district court retains jurisdiction to act in a limited number of circumstances, such as determining an application for attorneys' fees. Sheet Metal Workers' Int'l Assoc. Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999) (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 74 L. Ed. 2d 225, 103 S. Ct. 400 (1982)); Venen v. Sweet, 758 F.2d 117, 120 n.2 (3d Cir. 1985) ("A district court, during the pendency of an appeal is not divested of jurisdiction to determine an application for attorney's fees."). That well-settled principle, coupled with the Third Circuit's July 23, 2002 order staying Defendants' appeal, makes clear the Third Circuit's preference for attorneys' fees to be awarded along with the entry of final judgment to avoid piecemeal appeals. See Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988). Accordingly, this Court will retain jurisdiction to rule on Plaintiffs' petition for attorneys' fees. n3

2. APPLICABLE LAW

The enforceability of the fee-shifting provision contained in the Franchise Agreement is not in dispute, and provides for the award of reasonable attorneys' fees:

If FRANCHISEE fails to cure a default, . . . or if this Agreement is terminated, FRANCHISEE shall pay to DUNKIN' DONUTS all damages, costs and expenses, including without limitation interest at 18% per annum, or the highest permissible rate, and reasonable attorneys' fees, incurred by DUNKIN' DONUTS as a result of any such default or termination; and said

interest and all damages, costs and expenses, including reasonable attorneys' fees, may be included in and form a part of the judgment awarded to DUNKIN' DONUTS in any proceedings brought by DUNKIN' DONUTS against FRANCHISEE ....

(Dunkin' Donuts Incorporated Franchise Agreement, P9.C.2.) The choice of law provision contained in the Franchise Agreement provides that the laws of the Commonwealth of Massachusetts shall govern its interpretation. (Id. at P16.A.)

In a diversity case, absent a conflicting applicable federal rule of procedure, state law governs not only the actual awarding of attorneys' fees but also the method of determining those fees. Northern Heel Corp. v. Compo Industries, Inc., 851 F.2d 456, 475 (1st Cir. 1988); Buse v. Vanguard Group of Investment Cos., No. 91-3560, 1998 U.S. Dist. LEXIS 1242, at *8 (E.D. Pa. Jan. 30, 1998) (citations omitted). n4 Parties may contract to permit recovery of attorneys' fees, and a federal court will enforce contractual rights to attorneys' fees if the contract is valid under applicable state law. See SNA, Inc. v Array, 173 F. Supp. 2d 347, (E.D. Pa. 2001), aff'd, No. 01-4313, 43 Fed. Appx. 486, 2002 U.S. App. LEXIS 17317 (3d Cir. August 19, 2002) (finding contract provision for recovery of attorneys' fees in event of breach enforceable under Pennsylvania law); Kucel v. Walter E. Heller Co., 813 F.2d 67, 73 (5th Cir. 1987) (finding same under Texas law); see also McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1313 (2d Cir. 1993) (citations omitted). Under Massachusetts law, counsel fees can be assessed pursuant to specific affirmative authority, such as a contract. Northern Heel Corp., 851 F.2d at 475 (citations omitted).

In the instant matter, the Franchise Agreement contains specific authority for the award of reasonable attorneys' fees and neither party disputes the choice of law provision contained therein. Accordingly, this Court's award of Plaintiffs' reasonable attorneys' fees shall be guided by Massachusetts law.

3. FACTORS TO CONSIDER

Under Massachusetts law, in determining an attorney's fair and reasonable charge for his or her services,

many considerations are pertinent, including the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by controversy, and the results secured.

Mulhern v. Roach, 398 Mass. 18, 494 N.E.2d 1327, 1331 (Mass. 1986) (citations omitted). n5 Not one of these factors is necessarily decisive, and the weight to be given to each of them will vary according to the nature of the services rendered in the particular instance under examination. Id. (citations omitted). A district court has broad discretion in awarding reasonable attorneys' fees. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1034 (3d Cir. 1996).

In support of their Fee Petition, Plaintiffs submit the following documents: (1) Affidavit of lead counsel,

Robert L. Zisk, Esquire, of Schmeltzer, Aptaker & Shepard, P.C.; (2) "Partner, Associate & Legal Assistant Billing Rate Survey for Law Firms," which summarized billing rates in Washington, D.C., and was published by the National Survey Center in June 1, 2001; and (3) an itemized Matter Ledger Report. n6 As to the substance of Plaintiffs' itemized Matter Ledger Report, Defendants object only that the time spent and expenses charged by Plaintiffs' attorneys were excessive.

We now turn to the factors considered when determining a reasonable attorneys' fees award under Massachusetts law.

1. Ability and Reputation of Attorneys and Demand for Their Services by Others.

Plaintiffs' attorneys, the approximately 45-member Washington D.C. law firm of Schmeltzer, Aptaker & Shepard, P.C., specialize in franchise litigation and have represented numerous national franchisers, including International House of Pancakes,

Arby's, Meineke Discount Mufflers, Entre Computer Centers, Cottman Transmission Systems, Midas Mufflers, Burger King Corporation, Togo's Eateries, Inc. and Baskin-Robbins, Inc. Attorneys in the firm's franchise litigation practice have worked to establish a national reputation in the field of franchise law by presenting on relevant topics for such organizations as the International Franchise Association and the ABA Forum on Franchising, and by publishing newsletters on the topic of franchise litigation. The firm has represented Plaintiffs in litigation matters across the

country since 1989 as its primary national litigation counsel, and has accumulated substantial knowledge of Plaintiffs' organization, policies, practices, filing methods and history.

2. Importance of Matter.

The focus of the underlying case was the enforcement of the parties' Franchise Agreement, which this Court previously determined that Defendants had breached. As franchisers, the enforcement of franchise agreements is of obvious importance to sustaining Plaintiffs' business purpose.

3. Time Spent.

Plaintiffs' attorneys and legal assistants assert that they have expended a total of 2,705.03 hours over a period of three years, from April 1999 to June 2002, in enforcing termination of the Franchise Agreement. Plaintiffs' attorneys took four depositions of Defendants and their accountants, including one in particular where questions were repeated on the second day following the deponent's refusal to answer them the first day, and were obligated to file numerous discovery motions for Defendants' failure to provide even the most basic documents and responses.

As Plaintiffs' attorneys have accumulated a familiar understanding of Plaintiffs' business operations in the course of more than ten years of representation, Plaintiffs' attorneys were able to expend a significantly less amount of time becoming familiar with Plaintiffs' business structure and franchise organization. This

familiarity resulted in a corresponding reduction in fees and expenses.

4. Prices Charged for Similar Services in Similar Area.

The rates charged by Plaintiffs' attorneys and legal assistants are below market when compared with the rates charged for comparable services in the Washington D.C. area, according to the information contained in the billing rate survey published in June 2001. For example, Plaintiffs' lead counsel, Robert Zisk, Esquire, billed Plaintiffs at a rate of $ 225-$ 285 per hour, reflecting the civil litigation experience he acquired over nineteen (19) years of practice, the last fifteen (15) years of which focused on franchise litigation. Mr. Zisk's billing rate is lower than eighty-one percent (81%) of all partners, regardless of experience, in the Washington D.C. area. By way of further example, Steven A. Browne, Esquire, the primary associate on the matter billed at a rate of $ 160-$ 210 per hour, a rate that is lower than the average billing rates of other associates at his level. The majority of the hours billed by attorneys on the case were worked by Mr. Zisk and Mr. Browne.

5. Amount Involved or Value of Property Affected by Controversy.

The value of the controversy was substantial, specifically, Plaintiffs' rightful possession of a franchise worth in excess of $ 600,000.00.

6. Results Secured.

Plaintiffs' attorneys achieved Plaintiffs' primary goal of obtaining possession of its valuable business venture and terminating the Franchise Agreement.

4. AWARD OF REASONABLE ATTORNEYS' FEES AND EXPENSES

The Franchise Agreement provides that Defendants are responsible for reasonable attorneys' fees and expenses expended to enforce the Franchise Agreement. After careful consideration of the above factors, this Court is satisfied that the rates charged and time expended by Plaintiffs' attorneys were reasonable in light of Plaintiffs' counsel's ability and reputation, the importance of the matter, the prices charged in the Washington D.C. area, the amount involved, and the results secured. Having broad discretion to determine the reasonable amount of attorneys' fees, this Court grants Plaintiffs' Petition in part, specifically as to those discounted attorneys' fees n7 and expenses expended for the nonpayment issue upon which they prevailed on summary judgment, and for defending against Defendants' counterclaims. Those amounts are $ 97,499.70 in discounted attorneys' fees and $ 13,872.96 in expenses for the nonpayment issue; and $ 102,474.92 in discounted attorneys' fees and $ 14,595.51 in expenses for their defense of Defendants' counterclaims.

3. CONCLUSION

Accordingly, Plaintiffs' Rule 54(d) Fee Petition, or in the Alternative, Motion to Amend the Judgment is GRANTED IN PART.

ORDER

AND NOW, this 16th day of October, 2002, in consideration of the Rule 54(d) Fee Petition, or in the Alternative, Motion to Amend the Judgment to Include an Order of Reasonable Attorneys' Fees and Expenses filed by Plaintiffs Dunkin' Donuts Incorporated and Third Dunkin' Donuts Realty, Inc. (Doc. No. 183); Memorandum in Opposition thereto filed by Defendants Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company (Doc. No. 188); Defendants' Pre-Hearing Memorandum re: Attorneys' Fees (Doc. No. 190); Plaintiffs' Supplemental Memorandum (Doc. No. 192); and Defendants' Reply thereto (Doc. No. 193), it is ORDERED:

1. Plaintiffs' Rule 54(d) Fee Petition, or in the Alternative, Motion to Amend the Judgement to Include an Order of Reasonable Attorneys' Fees and Expenses is GRANTED IN PART.

2. Judgment is ENTERED in favor of Plaintiffs, and against Defendants, in the amount of $ 97,499.70 in attorneys' fees and $ 13,872.96 in expenses for the nonpayment issue, and $ 102,474.92 in attorneys' fees and $ 14,595.51 in expenses for their defense of Defendants' counterclaims.

BY THE COURT:
JAMES McGIRR KELLY, J.

FOOTNOTES

n1 See Dunkin' Donuts Inc., et al. v. Guang Chyi Liu, et al., 2002 U.S. Dist. LEXIS 12270, Nos. 99-3344 and 00-3666 (E.D. Pa. June 25, 2002).

For the reasons that follow, Plaintiffs' Fee Petition is GRANTED IN PART.

n2 Pursuant to the choice of law provision contained in the Franchise Agreement, Massachusetts law governs its interpretation. (Dunkin' Donuts Incorporated Franchise Agreement, P16.A.)

n3 Defendants also argue that a jury must decide the issue of attorneys' fees. Although Defendants may have had a right to a jury decision on whether Plaintiffs were entitled to recover attorneys' fees pursuant to the terms of the Franchise Agreement, they do not have the right to a jury decision on the reasonable amount of attorneys' fees. See McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1315 (2d Cir. 1993); see also Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Associates, Inc., 2002 U.S. Dist. LEXIS 12929, Civ. A. No. 00- CV-2231, 2002 U.S. Dist. LEXIS 12929, at *7-8 (E.D. Pa. March 5, 2002) ("it is permissible for a court to determine the amount of attorney's fees and costs to be awarded to a party pursuant to an . . . agreement in a separate proceeding, after a jury has determined that party may recover such an award . . . . While the Third Circuit has never opined on this procedure . . . . this procedure is commonly used in other circuits as well . . .

and is also the usual practice of this Court" (emphasis in original)).

n4 The Federal Rules of Civil Procedure provide general guidance on the procedures to be followed for fee petitions, but do not set forth the specific procedure by which a prevailing party should move for attorneys' fees and expenses. Thus, the procedure is often handled on an ad-hoc basis. See, e.g., TPS Technologies, Inc. v. Rodin Enterprises, Inc., 816 F. Supp. 345, 351 (E.D. Pa. 1993) (ordering prevailing plaintiff to submit motion and proposed order for attorneys' fees); Carpenter Technology Corp. v. Armco, Inc., 800 F. Supp. 215, 228 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993) (establishing schedule for briefing of attorneys' fees issue when party entitled to fees).

n5 This method is different from the federal lodestar method, which is most commonly used when determining attorneys' fees in federal court. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000); Lindy Brothers Builders, Inc of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167-169 (3d Cir. 1973), followed by, Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Northern Heel Corp., 851 F.2d at 475.

n6 Following this Court's instruction at the August 14, 2002 hearing, Plaintiffs submitted an itemized Matter Ledger Report that differentiated between fees and expenses relating to Plaintiffs' claims for nonpayment and to their defense against Defendants' counterclaims.

(See Pls.' Supp. Mem. In Support of Pls.' Rule 54(d) Fee Pet., or in the Alt. Mot. to Amend the J.)

n7 Plaintiffs received a dollar discount from Schmeltzer, Aptaker & Shepard on bills submitted in this case, which reflects an amount that is substantially less than the actual dollar value of the hours worked on the case.

CIVIL ACTION No. 99-3344, 00-3666

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DUNKIN' DONUTS, INC., et al.,
Plaintiffs,

v.

GUANG CHYI LIU, et al.,
Defendants.

June 25, 2002, Decided
June 25, 2002, Filed

COUNSEL: For DUNKIN' DONUTS INCORPORATED, THIRD DUNKIN' DONUTS REALTY, INC., PLAINTIFFS (99-CV-3344): DAVID E. WORTHEN, STEVEN A. BROWNE, SCHMELTZER, APTAKER AND SHEPARD, P.C., WASHINGTON, DC USA.

For DUNKIN' DONUTS INCORPORATED, THIRD DUNKIN' DONUTS REALTY, INC., PLAINTIFFS (99-CV-3344): ROBERT L. ZISK, THOMAS P. CARROLL, RICHARD L. CREECH, SCHMELTZER, APTAKER & SHEPARD, WASHINGTON, DC USA.

For DUNKIN' DONUTS INCORPORATED, THIRD DUNKIN' DONUTS REALTY, INC., PLAINTIFFS (99-CV-3344): CRAIG R. TRACTENBERG, BUCHANAN INGERSOLL PROFESSIONAL CORPORATION, PHILADELPHIA, PA USA.

For GUANG CHYI LIU, DEFENDANT (99-CV-3344): SEAN M. HALPIN, RICHARD H. GLANTON, REED, SMITH, SHAW AND MC CLAY, PHILA, PA USA.

GUANG CHYI LIU, DEFENDANT (99-CV-3344), Pro se, SEWELL, NJ USA.

For SUSAN YEH LIU, G.C.S.C.L. COMPANY, INC., DEFENDANTS (99-CV-3344): SEAN M. HALPIN, RICHARD H. GLANTON, REED, SMITH, SHAW AND MC CLAY, PHILA, PA USA.

SUSAN YEH LIU, DEFENDANT (99-CV-3344), Pro se, SEWELL, NJ USA.

For TEXTRON FINANCIAL CORP., RESPONDENT (99-CV-3344): SCOTT D. PATTERSON, SAUL, EWING, REMICK & SAUL, BERWYN, PA USA.

For DUNKIN' DONUTS INCORPORATED, THIRD DUNKIN' DONUTS REALTY, INC., PLAINTIFFS (00-CV-3666): DAVID E. WORTHEN, STEVEN A. BROWNE, SCHMELTZER, APTAKER AND SHEPARD, P.C., WASHINGTON, DC USA.

For DUNKIN' DONUTS INCORPORATED, THIRD DUNKIN' DONUTS REALTY, INC., PLAINTIFFS (00-CV-3666): ROBERT L. ZISK, SCHMELTZER, APTAKER & SHEPARD, WASHINGTON, DC USA.

For DUNKIN' DONUTS INCORPORATED, THIRD DUNKIN' DONUTS REALTY, INC., PLAINTIFFS

(00-CV-3666): JOHN J. JACKO, III, BUCHANAN, INGERSOLL, PHILA, PA USA.

For GUANG CHYI LIU, SUSAN YEH LIU, G.C.S.C.L. COMPANY, INC., DEFENDANTS (00-CV-3666): RICHARD H. GLANTON, REED, SMITH, SHAW AND MC CLAY, PHILA, PA USA.

JUDGES: JAMES McGIRR KELLY, J.

OPINIONBY: JAMES McGIRR KELLY

OPINION:

MEMORANDUM AND ORDER

J. M. KELLY, J.
JUNE 25, 2002

Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company, were franchisees and owners of a Dunkin' Donuts retail doughnut shop located at 5100 City Line Avenue, Philadelphia, Pennsylvania pursuant to a Franchise Agreement. Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc. (collectively "Dunkin'"), have been attempting to terminate the Franchise Agreement with the Defendants since 1999. Dunkin' filed suit against the Lius, alleging breach of contract, fraud, trademark infringement and unfair competition. Dunkin' also filed a separate complaint, seeking injunctive relief. Presently before the Court are the following motions: (1) Defendants' Motion for Reconsideration of the Court's Order of February 14, 2002 only as to the Counterclaim for Breach of the Implied Covenant of

Good Faith and Fair Dealing; (2) Plaintiffs' Motion to Strike Defendant's Handwritten and Improperly Signed May 2, 2002 Filing; and (3) Defendants' Objections to Magistrate Judge Thomas Rueter's Report and Recommendation of April 17, 2002.

I. FACTUAL BACKGROUND

A. Dunkin's Franchise System

Dunkin', a Delaware corporation with its principal place of business in Massachusetts, grants franchises to independent franchisees who operate Dunkin' Donuts shops throughout the United States and around the world. Dunkin' Realty is a wholly-owned subsidiary of Dunkin' that leases properties to Dunkin's franchisees. Franchisees, of whom there are approximately 3,700 nationally and 4,700 globally, primarily sell doughnuts, pastries, coffee and related products. Franchisees are licensed to utilize trade names, service marks and trademarks of Dunkin' in the operation of these shops. Franchisees also use specialty equipment, distinctive interior and exterior accessories, identification schemes, products, management programs, standards, specifications, proprietary marks and information. The general public knows and recognizes Dunkin' Donuts marks, and associates them exclusively with Dunkin's products and services.

B. Defendants' Franchise Agreement with Dunkin'

Pursuant to an Agreement to Transfer dated March 31, 1995 and a Franchise Agreement dated November 27, 1990, Defendants obtained a Dunkin' franchise in Philadelphia, Pennsylvania. As franchisees, Defendants

were granted a license to use the Dunkin' trademark. In return, Defendants were obligated to pay certain fees to Dunkin'. Pursuant to their Franchise Agreement, Defendants were required to pay: (1) weekly franchise fees of 4.9 percent of their gross sales n1; (2) weekly advertising fees of 5.0 percent of their gross sales; and (3) interest on unpaid fees. Failure to make these payments in a timely manner would constitute a default under the Franchise Agreement. In the case of such a default, Dunkin' was required to give Defendants written notice and a seven day "cure period" within which to cure the default. Failure by Defendants to cure the default before the expiration of the cure period would allow Dunkin', upon written notice, to terminate the Franchise Agreement.

The Franchise Agreement also contained many provisions relating to the continued use of trademarks after its termination. Specifically, the Franchise Agreement provided that: (1) "Upon any termination or expiration of this Agreement . . . Franchisee shall immediately cease to use . . . any methods associated with the name "Dunkin' Donuts," any or all of the Proprietary Marks [of Dunkin' Donuts]."); (2) "Any unauthorized use or continued use after the termination of this Agreement shall constitute irreparable harm subject to injunctive relief"; and (3) "Continued use by Franchisee of Dunkin' Donuts' trademarks, trade names, Proprietary Marks, and service marks after termination of this Agreement shall constitute willful trademark infringement by Franchisee."

C. Defendants' Lease

On March 31, 1995, Defendants also obtained a lease to the property on which their franchise was located. Dunkin' Realty acted as the landlord. Pursuant to the Lease, as amended, Defendants agreed to pay the following amounts to Dunkin' Realty: (1) monthly rent of $ 7,812.50; annual "percentage rent" in the amount by which twelve percent of the gross annual sales of their shop exceeded a specified annual base rent; n2 and (3) all real estate and other taxes relating to the premises, to be paid in monthly installments of 1/12 of the estimated annual real estate tax. If Defendants failed to make a timely payment, Dunkin' Realty could provide them with a written Notice to Cure. Failure to cure the default within ten days of such notice would entitle Dunkin' Realty to terminate the Lease. Dunkin' Realty could also terminate the Lease if the Franchise Agreement were to be terminated.

D. The Alleged Breach of the Lease and Franchise Agreement

Using the QRSA, Dunkin' determined that the Defendants under-reported their gross sales in 1998, in violation of the Franchise Agreement. As a result, on May 20, 1999, Dunkin' met with the Defendants and told Defendants they were terminating the Franchise Agreement. At this meeting, Dunkin' offered the Defendants the opportunity to sell their franchise to a third party on the condition that Defendants pay Dunkin' the estimated amount of unpaid fees plus attorney's fees. Defendants denied under-reporting and refused to give up the store. On June 30, 1999, Dunkin' filed suit seeking to end the Franchise Agreement.

While the first lawsuit was pending, Defendants became delinquent on the payments due under the Franchise Agreement. As of June 21, 2000, Defendants owed Dunkin' approximately $ 43,000.00. Of this total, $ 13,654.07 was for a year-end percentage rent charge under the Lease. n3 On June 22, 2000, Dunkin' served Defendants with a Notice of Default and Notice of Cure letter.

Defendants did not cure these defaults. n4 Defendants claimed to have sent checks to Dunkin' in May, 2000. Pursuant to Dunkin's standard business practice, Defendants would always send their checks to a lockbox in North Carolina, from which the checks would be deposited in a bank within twenty-four hours of their receipt. Dunkin's bank did not receive the checks, dated May, 2000, until late in July. Defendants later admitted that they backdated the checks as part of a record keeping procedure. By July 12, 2000, Dunkin' served Defendants with a Notice of Termination of their Franchise Agreement with Dunkin' and their Lease with Dunkin' Realty. The Defendants refused to accept the termination of the Franchise Agreement and Lease, and continue to hold themselves out to the public as Dunkin' franchisees. As will be discussed more fully below, a preliminary injunction was issued. Defendants no longer occupy the premises as of this date and Dunkin' has sold the franchise to a third party.

II. Procedural History

On June 30, 1999, Dunkin' filed suit in this Court, alleging Defendants violated the Franchise Agreement in two ways: under-reporting their sales and committing tax fraud. See Compl. in Civ. A. No. 99-

3344. On July 20, 2000, Dunkin' filed a second Complaint and a Motion for Preliminary Injunction, alleging that the Defendants failed to make timely payments due under the Franchise Agreement. See Compl. in Civ. A. No. 00-3666. In the second lawsuit, Plaintiffs sought to: (1) enjoin Defendants from further use of the Dunkin' Donuts trademarks and trade names; and (2) require them to vacate the franchise property. The two cases were consolidated in September 2000. Motions for summary judgment for both cases were referred to Magistrate Judge Thomas J. Rueter.

A. Counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing

In response to Dunkin's assertion in Civ. A. No. 99-3344 that Defendants under-reported their sales and committed federal tax fraud, Defendants asserted several Counterclaims n5 against Dunkin'. In resolving the various motions for summary judgment filed by both parties, Judge Rueter issued a Report, on December 20, 2000, recommending that this Court dismiss all of Defendants' Counterclaims. This Court then adopted and approved Magistrate Judge Rueter's Recommendation, n6 denying summary judgment on Plaintiffs' claims but granting summary judgment as to Defendants' Counterclaims in favor of Dunkin'. See Dunkin Donuts, Inc. v. Liu, 2002 U.S. Dist. LEXIS 4747, Civ. A. No. 99-3344, 2002 WL 442822 (E.D. Pa. Feb 14, 2002). Defendants' then filed a Motion for Reconsideration, but only as to this Court's dismissal of the breach of implied covenant of good faith and fair dealing Counterclaim.

B. The Injunctive Relief Case

During the pendency of the first action, the Defendants failed to make timely payments due under the Franchise Agreement. As a result, Plaintiffs filed another action. See Compl. in Civ. A. No. 00-3666. Plaintiffs simultaneously filed a Motion for a Preliminary Injunction, which sought to enjoin Defendants from further use of the Dunkin' Donuts trademarks and trade names, and to require Defendants to vacate the franchise property. This Motion was predicated entirely on the delinquent payment issue.

Judge Rueter held an evidentiary hearing on the issue of the Preliminary Injunction and recommended that the Court issue a temporary injunction against Defendants. The Court approved and adopted Magistrate Judge Reuter's Report and Recommendation and issued a Preliminary Injunction against the Defendants on December 21, 2000. The Court further ordered the Defendants to cease use of Plaintiffs' proprietary marks and to deliver the premises at 5100 City Line Avenue, Philadelphia, Pennsylvania to an authorized representative of the Plaintiffs. See Dunkin' Donuts, Inc. v. Liu, 2000 U.S. Dist. LEXIS 18388, Civ. A. No. 00-3666, 2000 WL 1868386, at *5 (E.D. Pa. December 21, 2000). n7

On August 6, 2001, Dunkin' filed a Motion for Summary Judgment on Counts I-IV Relating to Non-Payment, further seeking a permanent injunction. On March 18, 2002, Magistrate Judge Rueter held oral argument on the issue of a permanent injunction. On April 17, 2002, Magistrate Judge Reuter issued a Report and

Recommendation, making the following recommendations: (1) Plaintiffs' Motion for a Permanent Injunction with respect to the Termination of the Franchise Agreement and Lease should be granted; (2) the Franchise Agreement and Lease should be deemed terminated as of July 12, 2000; (3) Plaintiff Third Party Dunkin Donuts Realty, Inc., should be found to have lawful possession of the premises located at 5100 City Line Ave, Philadelphia, Pa 19145;(4) Plaintiffs may renew their request for attorney's fees pursuant to Federal Rule of Civil Procedure 54; and (5) the Court should grant Plaintiff's motion to voluntarily dismiss all claims asserted in Civ. A. No. 99-3344 pursuant to Federal Rule of Civil Procedure 41(a)(2). Defendants filed objections.

III. DISCUSSION

A. Motion for Reconsideration of this Court's February 2002 Memorandum and Order as to Breach of Implied Covenant of Good Faith and Fair Dealing Counterclaim.

Defendants' original objections to Magistrate Judge Rueter's December 20, 2000 Report mainly rested on one ground, that Magistrate Judge Rueter did not consider the whole "record." The Court rejected the Defendants' arguments. See Dunkin' Donuts, 2002 U.S. Dist. LEXIS 4747, 2002 WL 442822, at *3-4. The Defendants, in their present Motion for Reconsideration, essentially complain of the same deficiency in this Court's approval and adoption of Judge Rueter's Report. For the reasons stated below, the Court will reevaluate the Counterclaim for breach of implied covenant of good faith and fair dealing.

Motion for Reconsideration

The "purpose of a motion for reconsideration [under Local Rule of Civil Procedure 7.1(g)] is to correct manifest errors of law or fact or to present newly discovered evidence." See P. Schoenfeld Asset Management L.L.C. v. Cendant Corp., 161 F. Supp. 2d 349, 352 (D.N.J. 2001) (citing Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)). Such motions will only be granted where: (1) an intervening change in the law has occurred; (2) new evidence not previously available has emerged; or (3) the need to correct a clear error of law or prevent a manifest injustice arises. Id. (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). Because reconsideration of a judgment after its entry is an extraordinary remedy, motions for reconsideration are to be granted "sparingly." Id. 161 F. Supp. 2d at 353 (citations omitted).

Reconsideration motions may not be used to relitigate old matters, nor to raise arguments or present evidence that could have been raised prior to the entry of judgment. Id. 161 F. Supp. 2d at 352 (citations omitted). There must be more than a mere disagreement with the court's decision or a recapitulation of the cases and arguments previously considered by the court when it rendered its original decision. Id. The party seeking reconsideration must bring forth dispositive factual matters or controlling decisions of law previously brought to the court's attention but not considered in its original decision. Id. 161 F. Supp. 2d at 353.

In disposing of the breach of implied covenant of good faith and fair dealing Counterclaim, Judge Rueter found the following. Defendants claimed Dunkin' manipulated the QRSA, a computer auditing program which they claimed was unreliable, to extort money from its franchisees. Judge Rueter, however, found that Defendants failed to put forth evidence that Dunkin' engaged in conduct evincing "an aspect of fraud, deceit, or misrepresentation." See p. 13, Report and Recommendation of Magistrate Judge Rueter, December 20, 2000 (citing Dunkin' Donuts, Inc. v. Taseski, 47 F. Supp. 2d 867, 876 (E.D. Mich. 1999)). This Court agreed with Judge Rueter and as a result, dismissed the Counterclaim of implied covenant of good faith and fair dealing.

Defendants, in their Motion for Reconsideration, have pointed to a wrinkle in this Court's disposition of the Counterclaim for breach of implied covenant of good faith and fair dealing. As explained above, Judge Rueter's December 20, 2000 Report was correctly decided, based on the evidence and arguments presented to the Magistrate Judge before he issued his Report. In a brief filed almost a year later, however, Defendants advanced a slightly new theory underlying their Counterclaim of implied covenant of good faith and fair dealing. As explained in footnote 6 of this Memorandum and Order, this Motion was held in abeyance pending the resolution of Defendants' legal representation problems. After Defendants retained new counsel, this Court allowed Defendants additional discovery and allowed them to submit a supplemental brief. Defendants addressed the impact of the new discovery on the Counterclaim for breach of implied covenant of good faith and fair dealing but did so as

part of their brief in Opposition to Plaintiff's Motion for a Permanent Injunction and For Summary Judgment on Counts I-IV Relating to Non-payment, a claim asserted in the second lawsuit n8. As there was an oversight of this brief at the time the Court issued its February 14, 2002 Memorandum and order, the Court will now take the time to comb through the arguments and exhibits presented in the December 2001 brief which Defendants argue create a genuine issue of material fact on the Counterclaim for breach of implied covenant of good faith and fair dealing.

Standard of Review for Summary Judgment

Summary judgment is proper if "the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary

judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Rule 56(e) makes it clear that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

In the December 2001 brief, Defendants, rather than claiming that Dunkin' unlawfully used the QRSA to extort money from franchisees, argue that because the QRSA is an inherently unreliable auditing tool, Dunkin's charges of under-reporting are fabricated. Defendants theory is that the charges of under-reporting are a pretext for an improper motive, which is that Dunkin' terminates its Franchise Agreement so that they can resell the stores at a profit. Upon review of the arguments and evidence presented in the December 2001 brief, the Court finds that the only new evidence presented by the Defendants as to the pretextual use of the result obtained through QRSA is the deposition of Michael Mershimer, senior executive loss prevention for Allied Domeq Quick Service Restaurants, Dunkin's parent company.

Defendants argue that an inference can be drawn from Mershimer's testimony that because Dunkin' discontinued using the QRSA, it is an unreliable tool which goes to Defendants' theory that Dunkin's under-reporting allegations were a pretext. The Court has

read that portion of Mershimer's deposition and finds that there is no inference that can be drawn from Mershimer's testimony that Dunkin used the QRSA fraudulently against the Defendants. Mershimer testified that the QRSA is no longer being used as an auditing tool because Dunkin' found a better tool, not because there were any flaws with the QRSA n9.

Defendants also argue that the Counterclaim for breach of implied covenant of good faith and fair dealing should be revived because of the disposition in Dunkin' Donuts v. Shree Dev Donut LLC, 152 F. Supp. 2d 675 (E.D. Pa. 2001). In the Shree Dev case, Judge Yohn allowed the same counterclaim to go forward where the Defendants had made similar allegations of pretext. Shree Dev, 152 F. Supp. 2d at 678. In Shree Dev, the defendants, who were accused of bribery, countered that Dunkin' fabricated the bribery charges so that Dunkin' could acquire the Pittsburgh stores for less than what the defendants were willing to pay, and then resell those stores for a profit. Id.

Defendants' attempt to equate the Shree Dev case with the Lius' case fails. The basic commonality between the two cases is the Defendants' legal theory that Dunkin' used a pretextual reason to terminate the Franchise Agreement in order to sell the store for a profit. Shree Dev involved a factual question of bribery charges. 152 F. Supp. 2d at 676. Here, the Lius were charged with under-reporting based on the result of the QRSA. As Magistrate Judge Reuter and this Court have repeatedly found, the Lius have presented no evidence that the QRSA was fraudulently used against them. Even if there is some factual question as to the results of the QRSA, Defendants' allegations of pretext are

belied by unrefuted evidence that Dunkin' offered to allow Defendants to sell their store to a third party before and after litigation began. n10

Accordingly, as no new evidence has been presented which create a genuine issue of material fact as to the Counterclaim for breach of the implied covenant of good faith and fair dealing, Defendants' Motion for Reconsideration is denied.

B. Objections to Report and Recommendation of April 17, 2002

In response to Magistrate Judge Rueter's Report and Recommendation of April 17, 2002, the Defendants filed two separate objections on May 2, 2002. Defendants' counsel of record, Reed Smith, filed one and Defendant Guan Chyi Liu filed another, handwritten and signed by him. Before turning to the merits of Defendants' objections, the Court will address Plaintiffs' objection to the handwritten Motion filed by Defendant Guang Chyi Liu.

1. Plaintiff's Motion to Strike Defendant's Handwritten And Improperly Signed May 2, 2002 Filing

Federal Rule of Civil Procedure 11 provides that "every pleading, written motion, and other paper shall be signed by at least one attorney of record" and permits a party to sign only if "the party is not represented by an attorney." The Defendants are represented by Reed Smith L.L.P. who filed an objection on behalf of all Defendants. As of this date, no withdrawal of counsel for any of the Defendants, including Defendant Guang Chyi Liu who claims he is now representing himself pro

se, have been filed. See Local Civil Rule 5.1(c). Therefore, Defendant Guang Chyi Liu is not permitted to sign any papers submitted to this Court on behalf of himself. Accordingly, Plaintiffs' Motion to strike papers submitted by Defendant Guang Chyi Liu is granted.

2. Defendants' Objections to Report and Recommendation of April 17, 2002

Under 28 U.S.C. § 636(C) (1994), this Court is to make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. See also Fed. R. Civ. P. 72(b). It is clear that Defendants failed to make timely payments as required under the Franchise Agreement. Therefore, there is no dispute that the Defendants are in breach of the Franchise Agreement and Dunkin' had the right to terminate the Franchise Agreement. In the face of a clear violation, Defendants' pleaded the affirmative defense of unclean hands, contending that the Court should deny Dunkin' their Motion for a Permanent Injunction because Dunkin' had improper motives in attempting to terminate the Franchise Agreement.

a. Defense of Unclean Hands

Defendants' objection to the Magistrate Judge's Report rests on one ground, that there exists an issue of fact as to Plaintiffs' entitlement to equitable relief because of Plaintiffs' unclean hands. "To prevail on an unclean hands defense, the defendant must show fraud, unconscionability or bad faith on the part of the Plaintiff." S&R Corp. v. Jiffy Lube International, Inc., 968 F.2d 371, 377 n.7 (3d Cir. 1992) n11. The facts and

legal arguments presented are essentially the same as those underlying the Counterclaim for breach of implied covenant of good faith and fair dealing. These arguments have been presented to this Court over and over, each time to no avail. Defendants have not presented any evidence which a reasonable juror could find rises to fraud, unconscionability or bad faith on the part of Dunkin'. Therefore, Magistrate Judge Reuter correctly ruled that the Defendants were not successful in rasing the affirmative defense of unclean hands.

Defendants complain that Magistrate Judge Rueter did not distinguish Shree Dev, 152 F. Supp. 2d 675 and Minerva, 956 F.2d 1566. As previously discussed, the facts before the Shree Dev and Minerva courts and this Court are not identical, as Defendants contend. It is not clear to this Court what facts were available to Judge Yohn at the time he made his summary judgment decision in Shree Dev. The Court can only look to the facts presented in this case. In this case, the unrefuted evidence that Dunkin' offered to let Defendants sell their store to a third party, provided that the Defendants paid restitution for the alleged under-reporting, n12 belies Defendants' legal theory that Dunkin' acted with improper motive in attempting to end the Franchise Agreement.

Moreover, in the Shree Dev case, there was a factual dispute about the bribery charges. 152 F. Supp. 2d at 676. As a result, Dunkin' did not ask for summary judgment on the termination issue in Shree Dev. Here, there is no factual dispute that the Defendants were delinquent on the payments due under the Franchise Agreement. Because Defendants raised the affirmative defense of unclean hands to the equitable remedies due

to Dunkin', premised on the fact of non-payment, the question before the Court is whether Defendants acted with unclean hands in seeking to terminate on the non-payment issue. As there is no dispute that Defendants failed to pay as required, whatever their reasons might be, the charge of non-payment is clearly not a fabrication. Moreover, even if there was evidence of ulterior motive for terminating the franchise agreement, a franchiser has the right to terminate the agreement when there is an otherwise legitimate basis for termination. Jiffy Lube, 968 F.2d at 375.

b. Defendants' Unclean Hands

Finally, Defendants object to the finding that the Defendants themselves had unclean hands because Susan Liu offered an "incredible" explanation for Defendants' backdated checks. Her explanation was that Defendants dated their payments for the invoice due date, for reference, regardless of when actually paid. n13 Magistrate Judge Reuter's finding that Susan Liu's explanation was incredible is clearly justified in light of the several misrepresentations Defendants have made to this Court. n14 No reasonable juror could find her statements credible. In any event, even if there was some dispute about whether the Lius regularly backdated their checks, this does not change the fact that the Lius attempted to misrepresent the dates of the checks to this Court to refute charges of delinquent payment and that in fact, violated the terms of the Franchise Agreement.

Accordingly, the Court adopts and approves Magistrate Judge Rueter's Report and Recommendation of April 17, 2002.

ORDER

AND NOW, this 25th day of June, 2002, upon consideration of the following motions: (1) Motion for Reconsideration of the Court's Order of February 14, 2002 only as to the Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing (Doc. No. 172) filed by Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company; (2) Summary Judgment on Counts I-IV Relating to Non-payment (Doc. No. 150) filed by Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc.; (3) United States Magistrate Judge Thomas Rueter's April 17, 2002 Report and Recommendation (Doc. No. 174) and Objections thereto (Doc. No. 176), filed by Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company; and (4) Motion to Strike Defendant Guang Chyi Liu's Handwritten and Improperly Signed May 2, 2002 Filing (Doc. No. 178) filed by Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc., the Clerk of the Court is DIRECTED to ENTER the following ORDER:

1. Defendants' Motion for Reconsideration of the Court's Order of February 14, 2002 only as to the Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing (Doc. No. 172) is DENIED.

2. Plaintiffs' Motion to Strike Defendant's Handwritten and Improperly Signed May 2, 2002 Filing (Doc. No. 178) is GRANTED. The Clerk of the Court is DIRECTED to STRIKE Doc. No. 176 and Doc. No. 179.

3. Magistrate Judge Rueter's Report and Recommendation of April 17, 2002 (Doc. No. 174) is APPROVED and ADOPTED.

Defendants' Objection (Doc. No. 176) is DENIED.

A. Plaintiffs' Motion for Summary Judgment on Counts I-IV Relating to Non-payment (Doc. No. 150) is GRANTED. Judgment is ENTERED in favor of Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc. and against Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company.

B. Plaintiffs' Motion for a Permanent Injunction with respect to the termination of the Franchise Agreement and Lease is GRANTED.

1. Defendants' Dunkin' Donuts Franchise Agreement and Lease is terminated as of July 12, 2000.

2. Plaintiff Third Party Dunkin Donuts Realty, Inc.,has lawful possession of the premises located at 5100 City Line Ave, Philadelphia, Pa 19145.

4. Plaintiffs' motion to voluntarily dismiss all claims asserted in Civ. A. No. 99-3344 pursuant to Federal Rule of Civil Procedure 41(a)(2) is GRANTED. Civ. A. No. 99-3344 is DISMISSED.

5. The Clerk of the Court is DIRECTED to MARK this case as CLOSED.

BY THE COURT:
JAMES McGIRR KELLY, J.

FOOTNOTES

n1 Among other things, franchisees were required to accurately report weekly gross sales and to preserve all accounting and supporting documents. To verify gross sales, or in other words, to detect under-reporting, Dunkin' used a computer program known as "Quick Retail Sales Analysis" (QRSA). QRSA uses the records of franchisee's purchase of raw ingredients to calculate the amount of sales achieved by the franchisee. Paragraph 6.A of the Franchise Agreement provides that "DUNKIN' DONUTS representatives shall have the right to examine FRANCHISEE'S original books, records and supporting documents at reasonable times and to perform such tests and analyses as it deems appropriate to verify GROSS SALES." Intentional under-reporting of gross sales and falsification of financial data is good cause for terminating the Franchise Agreement.

n2 Any outstanding amount of percentage rent was to be paid within fifty days of the end of the lease year.

n3 Despite paying this amount in years past, and receiving an invoice in April, 2000 that explained the calculation of this charge, the Defendants claim that they were confused as to the source of this fee. Defendants also claimed to have serious difficulty speaking English or understanding simple business transactions. At a September 18, 2000 hearing, however, it was revealed that Ms. Liu had been employed as a full time nurse for fourteen years, was certified in oncology, and did not need an interpreter while at work. Moreover, Mr. Liu was a doctoral

candidate at the University of Pennsylvania prior to their purchase of the Dunkin' Donuts franchise.

n4 By July 10, 2000, Defendants' deficiencies had grown to over $ 46,000.00.

n5 Defendants alleged the following Counterclaims: (1) breach of the Franchise Agreement by requiring excessive remodeling and failing to provide training, marketing support, access to new promotional products, and ongoing assistance with the operation of the business; (2) breach of the Franchise Agreement by wrongful termination; (3) breach of implied covenant of good faith and fair dealing; (4) breach of duty to cooperate/hindrance of performance; (5) tortious interference with contractual relations; (6) fraud in the inducement and negligent misrepresentation; and (7) unlawful tying in violation of the Sherman Antitrust Act.

n6 Defendants have a history of trouble retaining and keeping counsel and have at times acted pro se. They were first represented by Benjamin G. Lipman of Philadelphia, and then in October of 1999, switched to Goldstein & Loots, a Washington D.C. firm. In February of 2001, the Philadelphia firm of Reed Smith took over as Defense counsel. There was however, some dispute over the status of legal representation and as a result, the summary judgment motions were held in abeyance.

After Defendants retained new counsel, a status conference was held on May 7, 2001. As a result of the discussion during the conference, the Court allowed Defendants sixty additional days of discovery. At the

conclusion of additional discovery, Defendants were granted leave to submit further briefing outlining the impact of any new evidence on any pending motion.

n7 Prior to the execution of the Preliminary Injunction, Defendants filed a pro se emergency petition to stay the injunction on January 16, 2001. This petition was denied without prejudice for failure to serve copy on counsels, both Plaintiffs' and Defendants'. A second Petition was filed and denied since Defendants had already vacated the premises and ceased using the proprietary marks. See Dunkin' Donuts Inc. v. Liu, 2001 U.S. Dist. LEXIS 1047, Civ. A. No. 00-3666, 2001 WL 111610 (E.D. Pa. Feb. 1, 2001).

n8 Dunkin's Motion in Limine regarding motive evidence was denied without prejudice to Plaintiffs' right to renew the motion after this Court's final disposition on the outstanding motion for summary judgment as of February 1, 2002.

n9 Defendants also complain that Dunkin' Donuts of America, Inc. v. Minerva, Inc., 956 F.2d 1566, 1570 (11th Cir. 1992) was not discussed. Minerva need not be discussed because the auditing tool at issue in Minerva was the "yield and usage" method, not the QRSA.

Defendants also point to a previously filed report, dated May 25, 2000, which purports to show that the assumptions underlying Dunkin's use of the QRSA in auditing the Defendants in 1998 were wrong. Even if this report somehow creates a factual dispute over the reliability of the QRSA results, Defendants' allegation of improper motive is still rebutted by the fact that

Dunkin' offered to allow Defendants to sell their store before and after litigation ensued.

n10 See Certification of Robert L. Zisk, Esq., Ex. A to Plaintiff's Mem. Supp. Mot. in Limine Regarding Motive at 3-4; Dep. of Jack Laudermilk, Ex. B; Letter of Thomas Carroll, Esq. to Jeffrey Goldstein, Esq., Ex. C.

n11 The Third Circuit, while noting defense of unclean hands was not raised in Jiffy Lube, nevertheless commented on the applicable standard.

n12 Defendants for the first time object to this evidence based on Federal Rule of Evidence 408 which provides:

Evidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . . . This rule also does not require exclusion when the evidence is offered for another purpose.

Defendants' attempt to preclude this evidence at this stage fails. First, Defendants did not object to this evidence in their summary judgment motion nor in their attempt to revive their Counterclaim of breach of implied covenant of good faith and fair dealing. Even if they had, Rule 408 would not exclude this evidence because this evidence is not being used to prove or disprove the underlying claim of non-payment. Rather it is being used by Dunkin' to rebut charges of improper motive.

n13 In support of their contention that Susan Liu's explanation is credible, the Defendants have attached hundreds of additional checks purportedly showing that the Lius made a regular practice of backdating their checks. While Defendants have proven themselves tenacious, this evidence is inadmissible reliable, it surely must have been available prior to this motion. These checks were not produced during discovery nor presented at any other relevant times.

n14 The facts relating to the Defendants' credibility issue on the non-payment claim have been noted several times by this Court. Because Defendants specifically object to the Magistrate Judge's finding of credibility, this Court is compelled to note these misrepresentations again. See footnotes 3 and 4 and accompanying text of this Memorandum and Opinion.

No. 02-2972

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DUNKIN' DONUTS INCORPORATED; THIRD DUNKIN' DONUTS REALTY, INC.

v.

GUANG CHYI LIU; SUSAN YEH LIU; G.C.S.C.L. COMPANY, INC. (Eastern District of Pa. Civil No. 99-cv-03344);

DUNKIN' DONUTS INCORPORATED; THIRD DUNKIN' DONUTS REALTY, INC.

v.

GUANG CHYI LIU; SUSAN YEH LIU; G.C.S.C.L. COMPANY, INC. (Eastern District of Pa. Civil No. 00-cv-03666); GUANG CHYI LIU; SUSAN YEH LIU; G.C.S.C.L. COMPANY, INC.,
Appellants

December 4, 2003

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, and CHERTOFF Circuit Judges

The petition for rehearing filed by Appellants Guang Chyi Liu, Susan Yeh Liu, G.C.S.C.L. Compnay, Inc., in the above-entitled case having been submitted to the

judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: December 4, 2003
Nmb/cc: (Steven A. Browne, Esq.
(David E. Worthen, Esq.
(Robert L. Zisk, Esq.
Kevin K. Tung, Esq.